No. 92-6073

In The

Supreme Court of the United States

October Term, 1992

RICHARD LYLE AUSTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF OF PETITIONER

RICHARD L. JOHNSON
Attorney at Law
101 South Main Ave., Suite 305
Sioux Falls, SD 57102
(605) 338-2626
Counsel of Record

SCOTT N. PETERS
Attorney at Law
300 North Dakota Ave., Suite 510
Sioux Falls, SD 57102
(605) 336-3700

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ARGUMENT

I. THE HISTORY OF THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT AND THE HISTORY OF CIVIL FORFEITURE SHOW THAT THE EXCESSIVE FINES CLAUSE APPLIES TO CIVIL FORFEITURES UNDER 21 U.S.C. § 881(a)(4) and § 881(a)(7).

The Respondent's first major premise is that " . . . any claim that the government's conduct in a civil proceeding is limited by the Eighth Amendment generally, or by the Excessive Fines Clause in particular, must fail unless the challenged governmental action, despite its label, would have been recognized as a criminal punishment at the time the Eighth Amendment was adopted." Resp.Br. 16.

The government refers to *Ingraham v. Wright*, 430 U.S. 651 (1977) and *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) for the proposition that the Eighth Amendment "was meant to apply only to penalties or exactions that may fairly be viewed as criminal punishment." Resp.Br. 12-13.

Browning-Ferris Industries, supra, however, does not "go so far as to hold that the Excessive Fines Clause applies just to criminal cases." *Id.* 492 U.S. at 263. The Court's holding is simply that the Excessive Fines Clause does not apply "to cases of punitive damages awards in *private civil cases*, because they are too far afield from the concerns that animate the Eighth Amendment." *Id.* 492 U.S. at 275. (Emphasis added). The Court leaves open the possibility of the application of the Excessive Fines Clause to civil cases where the government exacts an excessive financial burden on a person:

> We think it clear, from both the language of the Excessive Fines Clause and the nature of our constitutional framework, that the Eighth Amendment places limits on the steps a government may take against an individual, whether it be keeping him in prison, *imposing excessive monetary sanctions*, or using cruel and unusual punishments.

Id. at 492 U.S. 275. (Emphasis added). The Court cited *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989) in a footnote, stating that " . . . our opinion in *Halper* implies that punitive damages awarded to the Government in a civil action may raise Eighth Amendment concerns. . . . " *Id.* 492 U.S. at 275 n.21.

Nor does *Ingraham v. Wright, supra*, provide authority that the Excessive Fines Clause of the Eighth Amendment applies only to "criminal punishments." *Ingraham* involved the application of the Cruel and Unusual Punishments Clause to disciplinary corporal punishment in

public schools. *Id.* at 1405. Moreover, the Court "left open in *Ingraham* the possibility that the Cruel and Unusual Punishments Clause might find application in some civil cases." *Browning-Ferris Industries, supra*, 492 U.S. at 264, n.3, citing *Ingraham v. Wright*, 430 U.S. at 669, n.37. Further, as pointed out in the *Amicus Curiae* Brief of the A.C.L.U., *Ingraham* is factually distinguishable since its concern "was to distinguish the punishment of criminals from the punishment of school children," and "[a]ccording to the Court, '[t]he schoolchild has little need for the protection of the Eighth Amendment,' A.C.L.U. *Amicus Curiae* brief, p.12, citing *Ingraham v. Wright, supra*, 430 U.S. at 670.

The government argues that the Excessive Fines Clause was intended to " 'limit [] the ability of the sovereign to use its *prosecutorial* power . . . for improper ends.' " Resp.Br. 14, citing *Browning-Ferris, supra*, 492 U.S. at 267. Yet the "prosecutorial powers of government" display themselves in the civil context, as well as the criminal context. *Black's Law Dictionary*, defines the word "prosecution" as "A criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime." But it also states that, "The term is also frequently used respecting civil litigation. . . . " *Black's Law Dictionary*, (fifth edition) (1979).

Even accepting the government's first premise, it is difficult to ascertain how the loss of one's home and livelihood is not " 'sufficiently analogous to criminal punishments in the circumstances in which they are administered,' " Resp. Br. 16, quoting from *Ingraham v. Wright, supra*, 430 U.S. 669 n.37, so as to invoke the protections of the Eighth Amendment.

The government argues that the "Framers of the Eighth Amendment were quite familiar with civil *in rem* forfeiture and, in light of the ancient common law lineage of those forfeitures, the Framers could not have believed them part of an individual's punishment." Resp. Br. 16. However, the *in rem* forfeitures with which the Framers were familiar were different from the *in rem* forfeitures under 21 U.S.C. §§ 881(a)(4) and 881(a)(7) which are the subject of this case. In the case, *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 63 S.Ct. 499 (1943), cited by the government at Resp. Br. 17, the issue was whether California's forfeiture of a fishnet was a common law remedy "within the statutory exception to the exclusive jurisdiction in admiralty conferred on district courts of the United States. . . . " *Id.* 318 U.S. at 134. That case does state that common law courts in the Colonies were exercising *in rem* jurisdiction before the adoption of the Constitution. But the discussion centers in large part around proceedings against vessels charged with smuggling, forfeiture cases arising under the customs laws, and a comparison of jurisdiction of the common law courts with the jurisdiction of the courts of admiralty. *Id.* 318 U.S. at 137-152. Indeed, in the American Colonies, forfeiture cases were tried by a jury:

> But the vice-admiralty courts in the Colonies did not begin to function with any real continuity until about 1700 or shortly afterward. . . .
>
> By that time, the jurisdiction of common law courts to condemn ships and cargoes for violation of the Navigation Acts had been firmly established, apparently without question, and was regularly exercised throughout the Colonies. In general the suits were brought against the vessel or article to be condemned, were tried by jury, closely followed the procedure in

> Exchequer, and if successful resulted in judgments of forfeiture or condemnation with a provision for sale.

Id. 318 U.S. at 139-140. One commentator's explanation of why a ship was the "offender" in *in rem* proceedings also shows that the Framers understanding of an *in rem* proceeding may have differed from what our understanding is today:

> [T]he rationale of personality and "animation" given for bringing an action against the ship is nothing but a rationalization of a procedure of very long standing in the law of Admiralty which is rooted in the essential condition of maritime traffic, namely, that it functions largely in areas – the oceans – where sovereignty either does not exist, or is in dispute, and it is (or was) the case more often than not, that the owner of a vessel – or sometimes even the crew – was not reachable by the laws of any nation against which some offense or injury was alleged on the part of that vessel and its owners. The vessel alone, and its cargo, were usually all that could be seized for the satisfaction of any claim or as a forfeiture for any offense. Thus, very early in maritime law as Holmes acknowledges (p. 27) "the ship was not only the source, but the limit, of liability," since, to do otherwise, would have amounted to placing in greater jeopardy such shipowners who were citizens or residents of the country seeking the forfeiture.

See Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 Temp. L.Q. 169 (1973).

In *United States v. 92 Buena Vista Avenue, Rumson, New Jersey*, 507 U.S. ___, 113 S.Ct. 469 (1993) Justice Stevens enumerates various types of seizure and forfeitures of tangible property throughout the history of the country,

such as the seizure and forfeiture of "ships and cargos involved in customs offenses," "ships engaged in piracy," and "distilleries and other property used to defraud the United States of tax revenues from the sale of alcoholic beverages," *Id.* 113 S.Ct. at 479-480. Apparently, prior to the Court's decision in *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642 (1967), "the Government had power to seize only property that ' "the private citizen was not permitted to possess." ' " *United States v. 92 Buena Vista Ave.*, 113 S.Ct. at 480. Moreover, before the 1978 amendment to the *Comprehensive Drug Abuse Prevention and Control Act of 1970*, 84 Stat. 1236, which authorized the seizures and forfeiture of proceeds of illegal drug transactions, the original forfeiture provisions had "authorized forfeiture of only the illegal substances themselves and the instruments by which they were manufactured and distributed." *Id. U.S. vs. 92 Buena Vista Ave.*, 113 S.Ct. at 481. Thus, "[t]he original forfeiture provisions of the 1970 statute had closely paralleled the early statutes used to enforce the customs laws, the privacy laws, and the revenue laws; they generally authorized the forfeiture of property used in the commission of criminal activity, and they contained no innocent owner defense. They applied to stolen goods, but they did not apply to proceeds from the sale of stolen goods. *Id.* 113 S.Ct. at 481. Consequently, it is apparent that the forfeiture law with which the Framers were familiar was quite different from the forfeiture provisions of 21 U.S.C. §§ 881(a)(4) and 881(a)(7). Also different than the forfeiture law of the past is the concept of the "innocent owner defense." Although under common law "it was irrelevant whether the owner of the object was innocent of any wrongdoing," Resp. Br. 17, both § 881(a)(4) and § 881(a)(7) contain "innocent owner" defenses.

Petitioner does not argue that *in rem* forfeitures are "anachronistic" or "superstitious." *In rem* forfeitures and the historical application of the doctrine are appropriate in instances where "means of transportation employed in violations of the laws involved . . . are peculiarly adapted to such type of work as, for instance, high-speed powerboats, fast cars with secret compartments, and aircraft." Resp. Br. 22. "If such means of transportation are not forfeited, they will be readily available for future violations[,]" Resp. Br. 22, because they are adapted for such use. Vessels, vehicles and aircraft which are, in fact, "the operating tools of dope peddlers," Resp. Br. 22, are offending property within the historical context of *in rem* forfeiture; and they deserve to be forfeited.

Petitioner's mobile home and auto body shop were not adapted for use in the drug trade. It is clear that Petitioner has been further punished by the forfeiture of his home and business; and it is hard to believe that Petitioner's gun filled with bird shot that he used to shoot sparrows is one of the "well-known tools of the narcotics trade," or that this posed "the very threat with which Congress was concerned." Resp. Br. 24.

The government does not believe that there is any historical support for the application of the Excessive Fines Clause to *in rem* forfeitures. Resp. Br. 24-25. The historical basis for the Excessive Fines Clause, however, indicates that the Framers' concerns in drafting the Eighth Amendment were the very losses faced by Petitioner in this case. The *in rem* forfeitures under 21 U.S.C. §§ 881(a) and 881(a)(7) are more akin to "amercements" and "fines" as they were understood by the Framers than the *in rem* forfeitures which took place in Colonial America under the common law. The *in rem* forfeitures of today under 881(a)(4) and 881(a)(7) were the "amercements"

and "fines" of which the Framers were aware when they drafted the Excessive Fines Clause.

The history of the Excessive Fines Clause establishes that the Framers did not intend to limit the Eighth Amendment to criminal proceedings. *Browning-Ferris Industries, supra,* 492 U.S. at 294 (O'Connor concurring and dissenting). That history also establishes that the Framers' understanding of the word "fine" was that it was the equivalent of the word "amercement." *Id.* 492 U.S. at 289 (O'Connor, concurring and dissenting). The Framers understood that Magna Carta limited the use of amercements by requiring that the amount of the amercement be proportioned to the wrong and that it not be so large as to deprive a person of his livelihood. *Id.* 492 U.S. at 271, 109 S.Ct. at 2918. Petitioner's forfeited auto body shop was the equivalent of the Free-man's contenement or the villain's wainage, the forfeiture of which Magna Carta prohibited.

In considering the scope of the Excessive Fines Clause, as in other Eighth Amendment contexts, this Court looks "to the origins of the Clause, and the purposes which directed its framers." *Browning-Ferris Industries, supra,* 492 U.S. at 264, n.4. But the Excessive Fines Clause should also be interpreted in light of the changes in society, specifically, the changes in the texture and applicability of *in rem* forfeiture:

> [A]s the Court's jurisprudence under the Cruel and Unusual Punishments Clause indicates, its approach has not relied on history to the same extent when considering the scope of the Amendment. See *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958) (plurality opinion) ("The Amendment must draw its meaning from the evolving standards of

> decency that mark the progress of a maturing society").

Browning-Ferris Industries, supra, 492 U.S. at 264 n.4.

II. THE COURT'S ANALYSES IN *MENDOZA-MARTINEZ* AND *HALPER* CLEARLY ESTABLISH THAT CIVIL FORFEITURE UNDER 21 U.S.C. § 881(a)(4) and 881(a)(7) IS PUNISHMENT.

Notwithstanding the government's attempt to refocus the debate on the past history of forfeitures generally, and upon the pervasive social ills attributed to drug activity, the Court's holding in *United States v. Halper,* 490 U.S. 435 (1989), and the factors it cited as instructive in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963), are helpful in showing that application of the specific forfeiture provisions in sections 881(a)(4) & (7) is in fact punitive. The practical focus of *United States v. Halper,* upon "the purposes *actually served* by the sanction in question, not the underlying nature of the proceeding," *id.* at 447 n.7, and upon "a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve," *id.* at 448, provides the appropriate framework for this analysis: "Simply put, a civil as well as a criminal sanction constitutes punishment *when the sanction as applied in the individual case serves the goals of punishment.*" *Id.* (emphasis supplied).

In *Mendoza-Martinez, supra,* the Court recognized that, although the inquiry could be difficult and even elusive, seven objective factors, which are neither exhaustive nor dispositive, are at least useful:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding or scienter, whether its operation will promote the traditional aims of punishment – retribution and

> deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id. at 168-169 (footnotes omitted). Although Respondent cited these seven factors in its brief, its application of them to this case (Resp. Br. 26-32) was disingenuous. Instead of applying these factors to the specific forfeiture provisions relevant to Petitioner's loss, Respondent concentrates, almost exclusively, on forfeitures in general and then begs the question by asserting that section 881 simply provides a remedy for the societal ills caused by criminal drug activity. This illusory analysis resulted in Respondent simply concluding that "the sanction of forfeiture imposes no 'affirmative disability or restraint' on the property's owner," and that "scienter is irrelevant to an *in rem* forfeiture." (Resp. Br. 27-28). In a similar fashion, Respondent carefully avoids discussion of §§ 881(a)(4) & (7), as applied to Petitioner, positing instead that section 881(a) as a whole must be viewed as solely remedial.

Many of the subsections under section 881(a) are indeed remedial, in whole or in primary part.[1] As Congress extended the reach of civil forfeitures under this section, however, the broad application of sections

[1] For example, the forfeiture of the substances, materials and assets directly connected with the drug trade in subsections (1), (2), (3), (5), (6), (8), (9), (10) and (11) clearly appear to fit within a remedial scheme.

881(a)(4) & (7) often have both a penal purpose and effect, as demonstrated here.

The forfeitures exacted under §§ 881(a)(4) & (7) clearly act as an affirmative disability or restraint on Petitioner. As these sections were applied here, the forfeiture did not simply confiscate illegal property, or property specifically designed to perpetuate drug use and distribution, such as specially equipped vehicles, or conveyances like airplanes and ships designed for multiple transports of cargo, or specially designed storage or manufacturing facilities – forfeiture of which would clearly seem remedial. Rather, the broad scope of forfeiture under these sections resulted in the forfeiture of Petitioner's mobile home and business, neither of which were intrinsically, in themselves, designed to promote the drug trade – with the primary purpose and effect of disabling not drug activities, but him individually. He was in fact affirmatively disabled both in practical terms – loss of his habitat and employment – and economically, by loss of essentially everything he owned. Thus, even positing that this forfeiture is consonant with Congress' intent and a legitimate legislative end in the sanctioning of drug activity, it is not strictly remedial, as Respondent contends.

Nor did Congress intend it to be simply remedial. The express purpose of these sections, and particularly section 881(a)(7), is general disablement and deterrence. The legislative history shows, for example, that Congress specifically intended to enact section 881(a)(7) as an expansion of forfeiture aimed to deter, punish and economically disable the individual involved in drug trade. S. Rep No 225 98 Cong. 1st Sess 195, reprinted in 1984 U.S. Code Cong. & Admin. News, 3182, 3374 & 3378. (Pet.

Br. 29-30). Insofar as these two sections promote forfeiture of assets directly connected to the drug trade, their effect would be remedial; but, when the disability is incidental to the property and drug activity, as in Petitioner's case, the application of these sections serve to punish the individual.

The government's refusal to concede (or to even discuss) the fact that operation of these sections in this case promotes the traditional aims of punishment – retribution and deterrence – is similarly alarming. It simply strains logic to suggest that the forfeitures under these circumstances are only in remediation of drug activity. The acts of Petitioner could have taken place anywhere, and they were not conditioned on whether or not he was a renter, an owner, or a street dealer: the crime, in fact, was not dependent on the property forfeited or his interest in it; that was incidental. Obviously, a criminal, so inclined and undeterred, would simply sell at another location. In essence, the aim and effect of the statute applied in this case was primarily one of deterrance, not remediation. As discussed above, Congress specifically added § 881(a)(7) to further the deterrence aspect of the law. Moreover, this Court has recognized the punitive and deterrent purposes of the Puerto Rican forfeiture statutes that were modeled after § 881(a)(4) (before the innocent owner exception was added):

> Plainly, the Puerto Rican forfeiture statutes further the punitive and deterrent purposes that have been found sufficient to uphold, against constitutional challenge, the application of other forfeiture statutes to the property of innocents. Forfeiture of conveyances that have been used – and may be used again – in violation of the narcotics laws fosters the purposes served by

> the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686-687 (1974) (citing footnote 25, omitted).

Finally, the forfeiture of Austin's legitimate business also had a retributive effect of an enduring nature. Unlike civil remedies that are applied in at least some rough proportion to the direct harm caused, application of this forfeiture as applied to Petitioner deprived him not only of his property, but also of his ability to legally make a future living at his body shop on a continuing basis.[2]

Respondent also summarily dismisses the scienter factor as irrelevant to an *in rem* forfeiture. (Resp. 28). While arguably correct for forfeitures generally, and to several other subsections of § 881(a), that bald assertion is erroneous with respect to sections 881(a)(4) & (7). Both sections contain innocent owner exceptions that preclude forfeiture based on lack of knowledge of the owner. These statutory provisions go beyond the Court-fashioned innocent owner provision in *Calero-Toledo*, where the Court held that an owner may have a constitutional due process claim if he "proved not only that he was uninvolved in and unaware of the wrongful activity, but *also that he had done all that reasonably could be expected to prevent the proscribed use of his property.*" *Calero-Toledo v. Pearson Yacht Leasing Co., supra* at 689. (emphasis supplied). The §§ 881(a)(4) & (7) statutory exceptions, however, take

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[2] You take my house, when you do take the prop
That doth sustain my house. You take my life
When you do take the means whereby I live.
–William Shakespeare, The Merchant of Venice, act IV sc. I, 11 374-376

innocent ownership beyond the tort concept of negligence and impose a knowledge requirement that property is used or intended for use to facilitate drug crimes under the Act.

The behavior to which a forfeiture applies under §§ 881(a)(4) & (7) is also strongly tied to criminal activity. Forfeiture under § 881(a)(4) must relate to substances, materials, or equipment in § 881(a)(1), (2) or (9) that violate the criminal drug statutes under the act. Forfeiture under § 881(a)(7) is premised on acts that constitute a violation of the criminal laws punishable by more than one year's imprisonment. The inclusion of innocent owner exceptions in both sections, based on the owner's knowledge, and the administrative procedures for remission and mitigation of the forfeiture, § 881(d), further evidences an intent that forfeitures under these sections are designed for those suspected of conducting or fostering criminal behavior.

In presumably addressing the inquiry of "whether an alternative purpose to which it may rationally be connected is assignable for it." Respondent argues, again without specifically discussing 881(a)(4) and (7), that section 881(a) remedies social problems in two ways:[3] First,

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[3] Respondent's amici attempt, in various other ways, to tie application of § 881(a) forfeitures to the broad, all encompassing remedial goals of securing compensation for (1) those victims injured by criminal drug activities, and (2) the collective injuries visited upon society as a consequence of drugs in general. If sections 881(a)(4) & (7) can be used to visit all of the burdens that a government may associate with drug activities upon the property of each individual drug offender, such as Petitioner, then that purpose clearly appears excessive in relation to purely remedial goals. As the Second Circuit Court of Appeals noted in *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 37 (2nd Cir. 1992):

> While we are extremely sympathetic to the need to address our nation's serious narcotics problems, we do not believe that a disproportionately large forfeiture can be reasonably justified as a civil fine as opposed to punishment by placing full responsibility for the "war on drugs" on the shoulders of every individual claimant. This is particularly so where the individual claimant's violations are relatively minor. *See 38 Whalers Cove Drive*, 747 F.Supp. at 180; *see also Halper*, 490 U.S. at 449, 109 S.Ct. at 1902 (compensable portion of the 'costs and damages' suffered by the government was that directly caused by the defendant. . . . "

Id. at 37.

it removes the instruments used by drug traffickers to ply their trade, thereby protecting and preventing danger to the community. Second, forfeited assets help fund law enforcement activities. (Resp. Br. 32). Here, however, the government did not remove any instruments of the drug trade that were endangering the community. Moreover, the case of *United States v. Salerno*, which Respondent cites in support, is materially different. The prevention of danger to the community, underlying the Bail Reform Act in *United States v. Salerno*, 481 U.S. 739, 747 (1987), was narrowly circumscribed based on specific individualized factors, which "carefully limited the circumstances under which detention may be sought to the most serious of crimes," only after a full hearing, and "within the stringent time limits of the Speedy Trial Act." *Id.* at 747. Thus, *Salerno* does not support the open-ended, all encompassing remedial goal of protection that Respondent argues for here.

Nor does the fact that the government has a pecuniary interest in the forfeitures to fund law enforcement

activities, as discussed in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629, make application of sections 881(a)(4) & (7) any less punitive to Petitioner. Obviously the use of assets forfeited for punitive reasons can be ultimately used for remedial ends; but that does not change the fact that the underlying purpose and effect of that sanction is in fact to deter and economically disable.

Finally, *United States v. Ward*, 448 U.W. 242 (1980), is of little assistance, both factually, and in light of the Court's subsequent decision in *Halper*. *In Ward*, the fines imposed were assessed after an evidentiary hearing, which applied particularized factors relating to the business involved and the gravity of the violation. *Id.* at 245. Unlike the instant case, the purpose of the civil fines was specifically designed to assist in clean-up operations. As the majority noted, in distinguishing *Boyd v. United States*, 116 U.S. 616 (1886) and its progeny of forfeiture cases, "Boyd dealt with forfeiture of property, a penalty that had absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." *Id.* at 254.

Respondent argues that *Halper* stands for the proposition that where the civil penalties assessed under the statute serve *no* remedial purpose, they then constitute punishment. (Resp. Br. 33).[4] That reading is too narrow. Rather, after first reviewing the fact that retribution and deterrence, the "traditional aims of punishment," are not "leigtimate nonpunitive governmental objectives," the Court recognizes that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can

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[4] Respondent cites *Halper* as "[f]inding that the civil penalties assessed under the statute served no remedial purpose," and that the civil sanction in *Halper* ' "may not fairly be characterized as remedial, but *only* as a deterrent or retribution.' " (Resp. Br. 33). The government left out the phrase "to the extent that" the sanction may not fairly be characterized as remedial. *Halper, supra*, 490 U.S. at 449.

be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 448. Thus, when a civil penalty exceeds the compensatory interest, or loss, to the government, it is punishment in "the plain meaning of the word." *Id.* at 449. Significantly, the Court clearly spoke of the government's loss or compensatory interest in terms of the particular damages and losses it sustained in this particular case, not all fraud cases in general. *Id.* The Court also distinguished this case from *United States ex rel. Marcus v. Hess*, noting that in *Hess* "[s]ince proceedings under the stature were remedial and designed to 'protect the government from financial loss' – *rather than to 'vindicate public justice'* – they were civil in nature. *Id.* at 444.

Applying the *Halper* analysis to the facts in Petitioner's case, it is also beyond peradventure that the civil forfeiture sanction as applied here "serves the goals of punishment." *Id.* at 448. Even if some remedial purpose could be ascertained from the government's forfeiture of Petitioner's property, there is no doubt that the civil forfeiture in this case *also* served "either retributive or deterrent purposes." *Id.* Congress expressly recognized this as a purpose of the sections applied here, and that application is indeed punishment within the plain sense of the word.

Although *Halper* dealt with the Double Jeopardy Clause, the Court's analysis of the punishment issue should also apply in the context of the Excessive Fines Clause of the Eighth Amendment. That clause too is focused on safeguarding "humane interests"; and the constitutional protections provided by that clause is also "intrinsically personal." "Like the Double Jeopardy Clause, the Eighth Amendment is a 'personal' and 'humane' limitation on the government's ability to punish

an individual." *United States v. 38 Whalers Cove, supra,* at 35. In *Browning-Ferris Industries v. Kelco Disposal, Inc., supra,* decided shortly after *Halper,* the Court also suggested that punitive sanctions by the government, in the context of disabling an individual and raising revenue, could raise Eighth Amendment concerns under a *Halper* analysis:

> Here the government of Vermont has not taken the positive step to punish, as it most obviously does in the criminal context, nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual.

Id. at 275. In an accompanying footnote, the Court cited *Halper,* as holding that the Double Jeopardy Clause places limits on the amounts the Federal Government may recover in a civil action, and as implying "that punitive damages awarded to the government in a civil action may raise Eighth Amendment concerns. . . . "). *Id.* at n.21.

Finally, Respondent states that Petitioner is simply wrong in asserting that civil forfeitures present the same possibilities for abuse as criminal fines. (Resp. Br. 25-26). In fact, however, forfeiture presents more opportunity for abuse. Because of the procedural laxities of civil forfeiture, coupled with the potential for quickly raising large sums through the taking of whole assets, in values that far exceed what a fine might raise, law enforcement efforts have recently placed a decided emphasis on seizing property to do just that – raise money. In order to maximize seizures of property and generate revenue. Justice Department lawyers are grouped into "Asset Forfeiture Units," directed to increase production of forfeitures, and even reassigned from criminal matters to help generate funds. Maveal, *The Unemployed Criminal Alternative In The Civil War Of Drug Forfeitures,* 30 Am. Crim. L. Rev. 35,

49-50.[5] With that type of emphasis and financial incentive, law enforcement reportedly takes a strange twist:

> Forfeiture laws can create fiscal incentives that distort law enforcement. Florida drug agents working the I-95 cocaine corridor reportedly try to stop suspected drug buyers on their way south, while they still have forfeitable cash; on the northern route, the crooks simply have drugs, which are worthless to the narcs. Cary Copeland, director of the Justice Department's Office for Asset Forfeiture, acknowledges problems, but lauds the program as a revenue raiser. "This is the goose that lays the golden egg."

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[5] This article cites, as an example, an August, 1990, Attorney General bulletin warning U.S. Attorneys that "the Department was far short of its projections of $470 million in forfeiture deposits . . . :

> We must significantly increase production to reach our budget target. . . . Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.

EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, 38 U.S. ATTORNEY'S BULLETIN 180 (Aug. 15 1990)." *Id.* at p. 49, n.70.

It also cites a June, 1989, bulletin from "Acting Deputy Attorney General Edward S.G. Dennis Jr. [advising] all United States Attorneys that they must make all forfeiture cases 'current,' meaning doing all that could be done to advance the case for judicial action. 'If inadequate forfeiture resources are available to achieve the above goals, *you will be expected to divert personnel from other activities* or to seek assistance from other U.S. Attorney's offices, the Criminal Division, and the Executive Office for United States Attorneys.' EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, 37 U.S. ATTORNEY'S BULLETIN 214 and Exhibit A (July 15, 1989)." *Id.*, at 50, n.71 (emphasis supplied).